STANDING COMMITTEE ON SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION

REPORT NO. 8 OF 1993

18 May 1993

TERMS OF REFERENCE

(1) a Standing Committee for scrutiny of bills and subordinate legislation shall be appointed;

(2) the Committee shall with respect to any instrument of a legislative nature which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law) made under an Act consider whether the instrument -

- (a) is in accord with the general objects of the Act under which it is made;
- (b) unduly trespasses on rights previously established by law;
- (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
- (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (e) or the explanatory statement accompanying it meets the technical or stylistic standards to which such an instrument or explanatory statement ought, in the opinion of the Committee, to conform;

(3) the Committee shall with respect to the clauses of Bills introduced into the Legislative Assembly consider whether such Bills -

- (a) unduly trespass on personal rights and liberties;
- (b) makes rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
- (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
- (d) inappropriately delegate legislative powers; or
- (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (f) or the explanatory memorandum accompanying it meets the technical or stylistic standards to which such a Bill or explanatory memorandum ought, in the opinion of the Committee, to conform;

(4) the Committee shall consist of three members;

(5) if the Assembly is not sitting when the Committee is ready to report on Bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing and circulation;

(6) the majority of members constitutes a quorum of the Committee;

(7) the Committee be provided with the necessary additional staff, facilities and resources; and

(8) the foregoing provisions of the resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

MEMBERS OF THE COMMITTEE

Mrs E. Grassby, MLA (Presiding Member)
Mr G. Humphries, MLA (Deputy Presiding Member)
Ms H. Szuty, MLA

Legal Advisor: Emeritus Professor D. Whalan
Acting Secretary: Ms M. Weeks
Deputy Secretary: Ms B. Irvin

ROLE OF THE COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Legislative Assembly. The Committee does not make any comments on the policy aspects of the legislation. The terms of reference contain the customary principles of scrutiny that enable the Committee to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation that have been adopted, without exception, by all scrutiny committees in Australia. Such non-partisan, non-policy scrutiny allows the Committee to assist the Assembly passing into law Acts and subordinate legislation that comply with the high ideals set out in the terms of reference.

BILLS

Bills Upon Which No Comment is Offered

The Committee has examined the following Bills and offers no comment:

Drugs of Dependence (Amendment) Bill (No. 3) 1993

This Bill enables pharmacists approved under subsection 150(1) and nurses employed in Territory facilities to administer methadone, exempts methadone program treatment centres approved under subsection 150(1) from requirements as to witnessing the administration of methadone and requires Territory facilities to keep a separate methadone treatment register.

Law Reform (Miscellaneous Provisions) (Amendment) Bill 1993

This Bill provides that an action for damages for nervous shock may be brought in the Magistrates Court where the amount of damages sought is within the monetary jurisdiction limit of the Magistrates Court, removes sexist language and makes a number of modernising drafting changes.

Ombudsman (Amendment) Bill 1993

This Bill makes amendments consequential upon the setting up of the office of the Commissioner for the Environment.

Bills Upon Which Comment is Offered

The Committee has examined the following subordinate legislation and offers the following comments:

Commissioner for the Environment Bill 1993

This Bill provides for the appointment of a Commissioner for the Environment and for the functions of that office.

The Committee makes two comments on this Bill. In making them, the Committee notes that the provisions commented upon are both almost identical to provisions in the *Ombudsman Act 1989*. However, the *Ombudsman Act 1989* pre-dates self-government and, indeed, that Act was gazetted on 10 May 1989 and commenced on Self-Government day, 11 May 1989. The provisions in the present Bill do not appear to follow the protective provisions that the Assembly has inserted in recent legislation.

Missing Provisions for Identity Cards for Entry into Premises

Subclause 16(1) gives very wide powers to "the Commissioner or an authorised person" to enter an agency's premises for the purposes of an investigation.

The Bill does not appear to contain the customary protective provisions requiring the Commissioner or an authorised officer to produce any evidence to prove his or her identity on entry.

There are now many precedents in our ACT legislation for such identification provisions. A recent precedent that may be helpful would be the provisions in the *Animal Welfare Act 1992*.

Subsection 6(3) of that Act provides that the Minister shall issue an identity card to the Animal Welfare Authority and subsection 6(4) provides that the Authority shall issue his or her delegates with an identity card. There are follow up provisions in subsection 74(1), where "identity card" is further defined, and in section 79, which provides that the Authority shall issue identity cards to each inspector and authorised officer.

Representation of Person Criticised in a Report

Subclause 15(5) provides that, as a general rule, it is not necessary for a:

> "complainant or any other person to be afforded an opportunity to appear before the Commissioner or any other person in connection with an investigation by the Commissioner under this Act".

Subclause 15(6) ameliorates this to some extent by providing that the Commissioner is not to make a report:

> "in which he or she sets out opinions that are, either expressly or impliedly, critical of an agency or person"

unless (if there is criticism of an agency) the principal officer of the agency and the officer principally concerned have an opportunity "to appear before the Commissioner or before an authorised person" and make oral or written submissions, or (if there is criticism of a person) that person is given a similar opportunity to appear.

Subclause 15(7) provides that:

> "the principal officer may appear in person or a person authorised by the principal officer may appear on behalf of the principal officer".

However, subclause 15(8) does not give "a person other than a principal officer of an agency" such a unfettered right to be represented, but provides that:

> "the person may, with the approval of the Commissioner or of the authorised person, as the case may be, be represented by another person." (Emphasis added.)

Jurisdiction of Courts (Cross-vesting) Bill 1993

This Bill provides for the ACT's participation in the national cross-vesting scheme in the same manner as the States and the Northern Territory.

Commencement Clause

Clause 2, the commencement clause, does not follow the usual formula of imposing a 6 months time limit for the Act to come into force.

However, this is totally appropriate here, as the present Bill must wait for the passing of complementary amendments to the Commonwealth *Jurisdiction of Courts (Cross-vesting) Act 1987*.

The Committee noted a minor typographical error which may be corrected under standing order 191.

SUBORDINATE LEGISLATION

Subordinate Legislation Upon Which No Comment is Offered

The Committee has examined the following subordinate legislation and offers no comment:

Subordinate Law No. 20 of 1993 being the *Supreme Court Rules (Amendment)* made under section 36 of the *Supreme Court Act 1933* amends the rules relating to the taking of evidence otherwise than at trial.

Determination No. 39 of 1993 made under section 80 of the *Electricity and Water Act 1988* revokes the relevant fee fixed in Determination No. 53 of 1992 and fixes a reduced fee for supplying a plan for existing drainage under Regulation 20 of the Canberra Sewerage and Water Supply Regulations.

Subordinate Legislation Upon Which Comment is Offered

The Committee has examined the following subordinate legislation and offers the following comment:

Determination No. 40 of 1993 made under section 4 of the *Public Place Names Act 1989* revokes Determination No. 14 of 1993 and Determination No. 15 of 1993, determines the names, origins and significance of Conner Close in the Division of Palmerston and Shea Street in the Division of Phillip and revokes the determination of the naming of Shea Street.

Corrections Made

This Determination corrects errors that were made in the two determinations that are being revoked and to which the Committee drew attention in its Report No. 4 of 1993.

This Determination has very quickly corrected matters to which the Committee drew attention in that report. A very helpful letter from the Attorney-General, Mr Connolly, dated 6 May 1993 confirming the Committee's views is attached to this Report.

Determination No. 41 of 1993 made under section 99 of the *Taxation (Administration) Act 1987* revokes Determination No. 69 of 1992 and determines the concession rates of duties that are payable by eligible home buyers.

Could this Retrospectivity be Prejudicial to Individuals?

The Determination was signed on 6 May 1993 and published in *Gazette* No. S79 on 11 May 1993. However, as the explanatory statement notes the changes made by this Determination "are made effective from 16 February 1993".

There are two kinds of changes as compared with Determination No. 69 of 1992 which has been revoked.

First, there are increases in the sums of money upon which the concessions are calculated. A complete exemption from stamp duty was previously granted up to $112,000.00 and this has now been increased to $116,000.00. A lesser concession was granted for sums between $112,000.00 and $135,000.00 and these sums are now $116,000.00 and $140,000.00 respectively. The previous rate of stamp duty for this lesser concession was $14.09 per $100.00 or part thereof and the rate is now $14.23 per $100.00 or part thereof.

Secondly, the explanatory statement helpfully states:

> "This instrument amends the basis on which stamp duty concession is provided to include the purchase price or the value of the property, whichever is higher, for the calculation of the concession." (Emphasis added.)

Previously, only the value of the property was considered.

Of course, in both the present Determination and in Determination No. 69 of 1992, concessions from the normal levels of stamp duty are being given. As changes made by the present Determination "are made effective from 16 February 1993", it is only the period from that date until Determination No. 69 of 1992 was revoked and replaced by the provisions of the present Determination that could be affected by any prejudicial retrospectivity.

Perhaps a question could be asked as to whether any individual will be in a less advantageous position under the new Determination than that person would have been under Determination No. 69 of 1992 as a result of the present Determination being made retrospective to 16 February 1993.

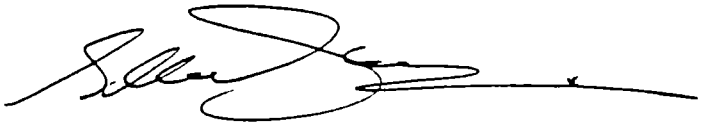
GOVERNMENT RESPONSES

The Committee has received responses to comments made concerning the following subordinate legislation:

- Instrument No. 181 of 1992 (the Gas Manual) made under section 70 of the *Gas Act 1992* (Report No. 23 of 1992).
- Determination No. 5 of 1993 made under section 4 of the *Public Place Names Act 1989* (Report No. 2 of 1993).
- Modification of the Building Code made under paragraph 24(2)(a) of the *Building Act 1972* (Report No. 1 of 1993).
- Determinations Nos 14 and 15 of 1993 made under the *Public Place Names Act 1989* (Report No. 4 of 1993).

Copies of the responses are attached.

The Committee thanks the Attorney-General for his positive responses.



Ellnor Grassby, MLA
Presiding Member

18 May 1993

A.C.T. GOVERNMENT
TERRY CONNOLLY MLA
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Mrs Ellnor Grassby MLA
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Dear Mrs Grassby

The Standing Committee on Scrutiny of Bills and Subordinate Legislation, in its Report No. 23 of 1992, commented on two aspects of Instrument No. 181 (the Gas Manual) made under section 70 of the *Gas Act 1992*.

Firstly, the Committee questioned the validity of incorporating in the Gas Manual specific standards of the Standards Association of Australia and of the Australian Gas Association "as in force from time to time".

I am advised that the incorporation of these standards "as in force from time to time" does not comply with the provision of paragraph 8(1)(a) of the *Subordinate Laws Act 1989* in that the standards are not legislatively determined. Moreover, their incorporation derogates from the Minister's powers to amend the Gas Manual as provided for in subsection 70(3) of the *Gas Act 1992*.

The Committee also commented on the fact that the Manual states that a distributor (a person authorised to reticulate gas under section 36 of the Act) "may make rules, consistent with any relevant standard or code, concerning the manner in which gasfitting work should be carried out in relation to gas installations that are, or are to be, connected to the distributor's reticulation system."

An examination of the Act reveals that there is no authority given for the exercise of these rule-making powers on the part of a distributor. Indeed, what may be contained in the Manual is a matter for the Minister and the mode of amendment is governed by strict statutory criteria and procedure. The adoption of distributors' rules in the Manual is outside the bounds of the statutory procedure and is, therefore, invalid.

An amendment to the Gas Manual is currently being prepared to remove the words "as in force from time to time" where applicable, and to delete all references to distributors' rule-making powers.

The Committee has also raised, in its Report No. 2 of 1993, some concerns about Determination No. 5 of 1993 made under section 4 of the *Public Place Names Act 1989*.

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The Committee was concerned that Determination No. 5 does not effect a revocation or refer to Schedule 'B' to revoke the street name Windsor Walk in the divisions of Barton and Forrest. I am advised that the Committee's concerns are correct. A further determination is being prepared that revokes Determination No. 5 to correct the error.

I trust that this advice is of assistance to the Committee.

Yours sincerely

Terry Connolly

30 MAR 1993

A.C.T. GOVERNMENT

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ATTORNEY GENERAL

RECEIVED
10 MAY 1993

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MAY
- 6 ~~APR~~ 1993

Ellnor

Dear ~~Mrs~~ Grassby

The Standing Committee on Scrutiny of Bills and Subordinate Legislation, in its Report No. 1 of 1993, commented on the fact that the Modification of the Building Code made under paragraph 24(2)(a) of the *Building Act 1972* (published in Gazette No. S235 of 16 December 1992) was not numbered and did not appear to have an accompanying explanatory statement.

I am advised that this occurred through an administrative oversight in the publishing of the Modification of the Building Code and that an explanatory statement was in fact prepared. I attach for the Committee's information a copy of that explanatory statement.

In its Report No. 4 of 1993, the Committee raised some concerns about Determinations Nos. 14 and 15 of 1993 made under the *Public Place Names Act 1989*.

The Committee was concerned that Determination No. 14 referred to "names" and "public places" when there is only one public place under consideration and the plurals are thus inaccurate. Secondly, there was an indication in the explanatory statement of an intention to revoke the determination of Shea Street in Schedule 'B'. The Determination itself however, did not effect a revocation or refer to Schedule 'B'.

The Committee was also concerned that Determination No. 15 was grammatically incorrect and did not constitute a determination.

I am advised that the Committee's concerns are correct. A further determination is being prepared that revokes Determinations Nos. 14 and 15 to correct the errors.

I trust that this information is of assistance to the Committee.

Yours sincerely

Terry Connolly

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MODIFICATION OF THE BUILDING CODE

The Building Act

The Building Act 1972 (the Act) regulates standards for the erection, alteration, demolition and occupancy of buildings. Section 24(2) of the Act provides for these technical requirements to be specified in the Building Code and for the Minister to adopt the provisions of the Building Code of Australia (BCA) as prepared and published by the Australian Uniform Building Regulations Co-ordinating Council, an association of State and Territory building control authorities. The section also provides for the Minister to prepare and publish an ACT Appendix to the BCA to provide for necessary and appropriate standards distinctive to the ACT.

The instrument adopting the Building Code is a disallowable instrument so as to give effect to the situation whereby the setting of building standards is a matter for government.

The 1990 edition of the BCA with its third amendment was formally adopted as the Building Code for the ACT on 31 July 1992.

The present instrument

The present instrument modifies the existing Building Code to make provision for the mandatory insulation of external walls and inaccessible ceilings in new residences and additions. It defines thermal resistance, sets minimum standards and specifies exemptions for certain building elements.

The modification of the Building Code takes effect on the date of the gazettal of a notice of preparation under section 25 of the Act.

1992

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

BUILDING ACT 1972

INSTRUMENT UNDER SECTION 24(2) OF THE BUILDING ACT

EXPLANATORY STATEMENT

Circulated by Authority of the Minister for Urban Services

Terry Connolly MLA